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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 84

FRANK MASCI LE,
Petitioner

vs.

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER

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Opinions Below

The opinions in the United States Court of Appeals for the Second Circuit are reported at 236 F. 2d 601 (1956) and are printed in the record at page 113. There was no opinion in the United States District Court for the Eastern District of New York.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on August 22, 1956 (R. 120). No petition for rehearing was filed. By order of Mr. Justice Harlan, dated September 13, 1956, the time for filing a petition for a writ of certiorari was extended to and including October 22, 1956 (R. 121) and said petition was filed on October 22, 1956, together with a motion for leave to proceed in forma

pauperis. The petition for a writ of certiorari and the motion for leave to proceed in forma pauperis were granted by order of this Court on February 25, 1957 (R. 122).

Statutes Involved

Petitioner was convicted of violations of 21 U.S.C. §174, 26 U.S.C. §§2553(a) and 2554(a)* and 18 U.S.C. §2. The first three sections relate to narcotics, and the fourth is a general definition of a "principal" in a criminal offense. These sections are set forth in the Appendix hereto.

Question Presented

Petitioner was convicted after a jury trial of unlawfully selling and conspiring to sell an ounce and a quarter of heroin hydrochloride, a narcotic drug. Petitioner did participate, though not directly, in the narcotic sale in question. His participation, however, was induced by Government agents, and his defense was that of entrapment.

The question presented is whether the trial court erred in refusing to direct a judgment of acquittal where the undisputed evidence showed that

a) Petitioner was induced by Government agents to participate in the narcotic sale,

b) Petitioner had not previously trafficked in narcotics and was not a user of narcotics, and

c) The urgings of the Government agents that petitioner commit the illegal acts continued for a period of over two months before petitioner actually did so,

and where the Government produced no substantial evidence that petitioner ever would have engaged in the

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* References to Title 26 U.S.C. are to the 1939 Internal Revenue Code in effect during the period in question. Similar provisions are contained in the 1954 Code at 26 U.S.C. §§4704(a) and 4705(a).

narcotics trade but for the persuasion of the Government agents.

Statement of the Case

On March 2, 1954, there was a sale in Brooklyn of one and a quarter ounces of heroin hydrochloride and sugar (R. 10-13, 28). The purchaser of the heroin was a Government agent named Marshall (R. 10-13). The seller was never apprehended. He dealt through a middleman, and Marshall spoke to him only on the telephone (R. 10, 34-5). The middleman was Walter Seifert, who introduced Marshall to the seller on the telephone, took Marshall's money and led him to the place where the heroin had been left for him (R. 10-13). Petitioner's role in the transaction was to introduce Marshall to Seifert and to loan them his sister's car to aid in consummating the sale (R. 9-12).

Petitioner testified at the trial, and his testimony was uncontradicted, that he was persuaded to participate by the persistent urgings of Marshall and an employee of Marshall's named Kowel (also referred to as Paveleski). These urgings continued for a period of two months before the sale was finally made.

The story begins around the first of December, 1953, when Kowel walked into the office of Marshall, the Government agent (R. 16-7). Kowel advertised himself as familiar with the narcotics business, said he knew some "pushers" of narcotics (R. 17). He was hired by Marshall as a "special employee" (R. 16). Marshall paid him on an informal basis—"when I saw him and he said he was out and spent $5 or $10 the previous night at a bar or whatever he needed, that is the amount of money I would give him" (R. 17).

Kowel was not produced by the Government to testify at the trial; petitioner's testimony as to their relationship stands uncontradicted.

Petitioner had known Kowel for several years although he knew him under the name of Paveleski (R. 50-1). In December, 1953, or in the early part of January, 1954, Kowel met with the petitioner and introduced the subject of selling narcotics (R. 52, 56). His words to the petitioner were "Get hep to yourself. You can make a lot of money." (R. 56). Petitioner's uncontradicted testimony was that he "didn't want no part of that" and that he told Kowel he was not interested (R. 57).

Petitioner testified that he had never used narcotics and that he had never engaged in any narcotic transactions (R. 59, 85). This testimony was uncontradicted and the Government has not contended otherwise.

Over the next few weeks Kowel continued to talk to the petitioner about narcotics and to urge him to meet with a "buyer who was in the market to buy narcotics" (R. 58, 62-5). Kowel emphasized the money that was to be made and finally asked petitioner to meet his buyer and at least put up a front as if he were a big dealer in narcotics (R. 65). Petitioner consented, and the meeting took place in a bar and grill in Brooklyn on January 14, 1954 (R. 5-6, 67-8). The "buyer", of course, was Marshall, the Government agent.

Petitioner's relationship with Marshall continued for the next six weeks until the sale in question actually occurred. Both Marshall and the petitioner testified as to their meetings and telephone conversations during this period. Each supplied details not mentioned by the other, but there is no real contradiction whatsoever in their testimony. Both Marshall and the petitioner agree that the first conversation was about narcotics (R. 6, 69). Both petitioner and Marshall testified in substance that petitioner had said he could not obtain narcotics for Marshall at that time (R. 7, 69), and Marshall added that petitioner had said that

"primarily he was a gambler and that he was not a narcotics trafficker as such" (R. 7, 20).

Marshall said that he talked to the petitioner "at least ten times" during the succeeding weeks (R. 8). They met on two or three occasions and discussed petitioner's "inability to date of being able to introduce [Marshall] to the right source of supply" (R. 8-9, 71, 73, 80). On one such occasion Marshall loaned the petitioner $5.00 (R. 80-1). In addition, petitioner was called at least three times by Kowel and urged to continue looking for a seller of narcotics or at least to impress Marshall with the fact that he was so looking (R. 71-2, 79, 81). Petitioner testified that he told Marshall from time to time that he was trying to locate a seller of narcotics, but in fact, he was not so trying (R. 71, 80).

Towards the end of February, petitioner testified, Kowel called, urged the petitioner "not to spoil things for him," and asked the petitioner either to help him or to drop out of the picture. Petitioner replied in substance that he could not drop out of the picture—"I can't seem to get this man off my back now" (R. 81).

A day or two later Marshall called the petitioner, and the petitioner told him that he was going to see somebody in an effort to arrange a sale of narcotics (R. 82). This time the petitioner did in fact see somebody and that somebody was Walter Seifert (R. 82-3). Petitioner arranged a meeting between Seifert, Marshall and himself for March 1st (R. 83).

Seifert who had pleaded guilty and was awaiting sentence, testified as a Government witness (R. 30). He had first met petitioner some time after January 14th, the date of petitioner's first meeting with Marshall (R. 30, 38-9).

Having introduced Seifert to Marshall at the meeting on March 1st, petitioner's real participation in the trans-

action came to an end. Although he was present during the preliminary conversation, he was not with Marshall and Seifert when they telephoned the real seller of the narcotics (R. 10). It is true that the petitioner was on hand the next morning, March 2nd, when Seifert and Marshall met again, and it is true that the petitioner loaned his sister's car to Seifert (R. 10-1). But petitioner left the scene even before Marshall and Seifert had gone off together to obtain the drug, and he did not have any connection with the subsequent events (R. 11-2).

At the close of the prosecution's case, petitioner's counsel moved to dismiss (R. 48-9). When both sides had rested, he moved for a direct verdict (R. 96-7). Both motions were based on the evidence of entrapment. These motions (now called "motions for judgment of acquittal"—Rule 29(a)) should have been granted.

Summary of Argument

The narcotics offenses committed by petitioner were induced by Government agents. There was no evidence that petitioner had ever previously violated the narcotics laws or trafficked in narcotics. There was no evidence that petitioner had made any plans or preparations to violate the narcotics laws. Accordingly, there was not sufficient evidence from which the jury could have found that petitioner had the "predisposition and criminal design" referred to by this Court in *Sorrells* v. *U. S.*, 287 U. S. 435, 451 (1932).

The court below held in effect that petitioner's willingness to yield to the inducement of a Government agent was sufficient evidence in itself from which the jury might find that he had the requisite "predisposition and criminal design" and hence was not "entrapped." For the reasons stated so clearly in the dissenting opinion below, however, a willingness to be persuaded does not justify inducing the

commission of a crime and does not rebut the defense of entrapment (R. 117).

Furthermore, there was a failure of proof even on the question of petitioner's willingness. The Government produced no evidence whatsoever of the communications or relationship between petitioner and Kowel, the first Government agent to approach him. The testimony relied on by the Court of Appeals covered only the period after petitioner had first met Marshall, the second Government agent, a meeting which occurred several weeks after petitioner had been first approached. Thus, the record does not reveal whether, at the critical time of the first attempt to persuade him, petitioner was willing or otherwise to adopt the course urged on him by Kowel which led ultimately to narcotics violations.

ARGUMENT

I

There Was No Evidence of Any Prior Conduct on Petitioner's Part Showing a Predisposition or Criminal Design to Commit the Offense Charged. Accordingly, Judgment of Acquittal Should Have Been Entered.

On the trial of this action petitioner did not deny committing the acts with which he was charged. His defense was that of entrapment, and the trial judge submitted the issue of entrapment to the jury. Petitioner contends that there was no question for the jury and that his motion for a directed judgment of acquittal should have been granted. The question before this Court, therefore, is "whether there was any competent and substantial evidence fairly tending to support the verdict" on the issue of entrapment. *Mortensen* v. *U. S.*, 322 U. S. 369, 374 (1944). See also *American Tobacco Co.* v. *U. S.*, 328 U. S. 781, 787 (1946); *Abrams* v. *U. S.*, 250 U. S. 616, 619 (1919).

This Court has held that entrapment is a good defense in a criminal prosecution. *Sorrells* v. *U. S.*, 287 U. S. 435 (1932). The defense is a valid one because criminal statutes will not be construed so as to include within their prohibition conduct improperly induced by the Government (Id. at pp. 450-1).

But not every instance of inducement by Government officials gives rise to the defense of entrapment. The "controlling question," as framed in the *Sorrells* case, is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials" (p. 451). On that issue this Court said "The predisposition and criminal design of the defendant are relevant" and the defendant cannot complain of a searching inquiry "into his own conduct and predisposition as bearing upon that issue" (p. 451). This Court has not had occasion, since the *Sorrells* case, to speak further on the issue of entrapment, but the lower courts have discussed it in numerous cases. We submit that the decision below in the case at bar is a departure from principles established by this Court and heretofore followed by the other Federal courts. See 33 ALR 2d 884 (1954); 31 St. John's L. Rev. 262 (1957).

Shortly after the *Sorrells* decision, the Second Circuit Court of Appeals decided *U. S.* v. *Becker*, 62 F. 2d 1007 (1933). The opinion discussed the *Sorrells* case and earlier decisions of the lower Federal courts in an effort to decide what circumstances might be held to justify a government official in inducing the commission of a crime. The Circuit Court concluded:

> "The only excuses that courts have suggested so far as we can find, are these: an existing course of similar criminal conduct; the accused's already formed design

> to commit the crime or similar crimes; his willingness to do so, as evinced by ready complaisance" (p. 1008)

This passage has been cited and followed many times since by other Federal courts. The three excuses outlined there for instigating a crime were reaffirmed by the Second Circuit in its more recent decision, *U. S.* v. *Sherman*, 200 F. 2d 880 (1952). The proof that the prosecution has not seduced an innocent person may be provided "by evidence of his past offences, of his preparation, even of his 'ready complaisance'" (p. 882).

Neither the *Becker* nor *Sherman* cases held, however, that "ready complaisance" *alone* was sufficient to rebut the defense of entrapment. That question was expressly reserved in the *Becker* case:

> "But we do not wish to commit ourselves to the doctrine that mere readiness is enough * * * " (p. 1009).

And a reading of the *Sherman* opinion discloses that the case was sent back for a new trial because "there may be other evidence of Sherman's *dealings* in narcotics" (p. 883) (italics ours).

Nevertheless, in the case at bar, the court below has held that mere willingness to be induced is sufficient to rebut the defense of entrapment. The late Judge Frank in his dissent analyzed the majority view as follows:

> "Disregarding all testimony not favorable to the prosecution, we have this basic fact on which this conviction must stand or fall: Before Marshall, the government agent, met the defendant, the latter had never been guilty of the crime of illegal dealing in narcotics or of anything like it. He had been twice convicted on charges of gambling, a fact to which my colleagues do not refer, obviously because gambling is a crime so

wholly different in character that it must here be disregarded as a factor rebutting the defense of entrapment. So, to all intents and purposes, we have this simple case: A man, theretofore innocent of criminal wrong-doing, is easily persuaded by a federal detective to do an act which a criminal statute, read literally, makes a crime.

The following illustration will help to bring sharply into focus the problem we face here: Mr. Weak meets Mr. D. E. Coy at a bar. Unknown to Weak, Coy is a plain-clothes detective. Coy knows that Weak has never committed a crime. But, over some drinks, Coy drops a hint about the two of them burglarizing a certain house. As the hint does not shock Weak, Coy more openly proposes the burglary. Weak agrees. The next night they break into the house. Coy then arrests Weak. At Weak's trial for burglary, he sets up the defense of entrapment. Is the defense no good because of Weak's willingness to accept Coy's proposal? My colleagues say, Yes. I think the Supreme Court says, No" (R. 117-8).

In the case at bar, petitioner had no prior convictions for narcotics offenses. He was not a user of narcotics and had never trafficked in narcotics (R. 59, 85). The Government has not contended otherwise. It is true that petitioner had two prior convictions for gambling and one for conspiracy to commit a robbery which did not take place (R. 77, 89), but the court below did not refer to this criminal record, and, as Judge Frank in his dissent noted, it was "so wholly different in character that it must here be disregarded as a factor rebutting the defense of entrapment" (R. 117).

There was no evidence of any preparation or plan on the part of petitioner to deal in narcotics. In fact, the

record shows conclusively that he was unprepared. He had no narcotics of his own to sell. It took him from January 14 when he first met Marshall (R. 6) until March 1 to locate anybody who could provide Marshall with narcotics (R. 9). During the intervening six weeks Marshall, by his own testimony, spoke to petitioner at least ten times, met with him at least twice, and discussed petitioner's "inability to date of being able to introduce me to the right source of supply" (R. 8-9). And when petitioner did produce somebody, it was the middleman Walter Seifert who testified as a government witness that he had never met petitioner until "about a month" before March 1 or two weeks after petitioner first met Marshall (R. 30, 38-9). It is evident, therefore, that when Marshall first approached him, petitioner had no heroin himself, no source of obtaining it and no ready means of locating such a source.

The majority in the court below held, nevertheless, that there was sufficient evidence to satisfy the jury "'that the accused was ready and willing to commit the offense charged, whenever the opportunity offered'" (R. 116). They found this evidence in petitioner's apparent willingness to locate a source of narcotics for Marshall and in his efforts during the subsequent weeks to carry out this plan.

Such a holding, we submit, conflicts with sound and established principles. This Court in the *Sorrells* case clearly contemplated that a defendant's *past* conduct must be such as to justify the action of Government agents in inducing the commission of a crime. The opinion refers to "the conduct and purposes of the defendant *previous* to the alleged offense" (p. 451, italics ours). Other Federal courts have upheld the defense of entrapment where there was no showing of similar past offenses. *U. S.* v. *Sherman*, 200 F. 2d 880 (C. A. 2d 1952); *Morei* v. *U. S.*, 127 F. 2d

827 (C. A. 6th 1942); *Cline* v. *U. S.*, 20 F. 2d 494 (C. A. 8th 1927); *Butts* v. *U. S.*, 273 Fed. 35 (C. A. 8th 1921).

Of necessity, this must be the rule. If the defendant's previous conduct does not justify the entrapment, then the defense of entrapment becomes meaningless. Before the defense can be invoked, the defendant must have committed a crime and, absent fraud or duress, he must have willingly committed the crime. "There would be no such thing as entrapment unless a party had committed the offense charged." *Morei* v. *U. S.*, 127 F. 2d 827, 834 (C. A. 6th 1942). At some point, therefore, in the course of events preceding the commission of every crime induced by Government agents, the defendant must have yielded to persuasion and agreed to play his part. If the decision of the court below is followed, then it will become the jury's duty to determine the degree of resistance which the petitioner offered to the inducement by the Government. A Government official may attempt to persuade any person, regardless of his prior conduct or acquaintance with crime, to commit an offense, and the propriety of the official's acts will turn on how readily his subject yielded to the persuasion. Once the test becomes ease of persuasion, a defendant's guilt or innocence will depend as much on the skill of the persuader as upon his own "predisposition and criminal design."

To quote again from Judge Frank:

> "If my colleagues' distinction between an easy and a difficult persuasion is adopted how will it work? Just what is an easy seduction? What is its measure? After how long a period of official instigation is a defendant's literal infraction of a statute not a crime? Will it be a crime if he yields to a detective's blandishments at the end of two or three months but not if at the end of eight or ten?" (R. 119).

The "controlling question" of the *Sorrells* case was "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials" (p. 451). The fact that a defendant has easily succumbed to the persuasion of a Government agent is in no way inconsistent with the proposition that he was "otherwise innocent." A crime committed by one who yielded easily to such persuasion is nevertheless "the product of the creative activity of [the Government's] own officials" unless it can be shown that the crime would have been committed without the persuasion.

II

Even on the Question of Petitioner's "Willingness" There Was a Complete Failure of Proof.

The court below based its holding on petitioner's apparent willingness to commit the offense as expressed at his first meeting with Marshall on January 14 and during the subsequent weeks. As to this there was testimony of Marshall and of the petitioner himself.

But the fact was that Marshall's "special employee" Kowel had for several weeks prior to January 14 been persuading the petitioner to meet with Marshall and to try to locate a source of narcotics for him (R. 52-68). Petitioner testified at length as to his dealings with Kowel. He testified that he said on several occasions that he wanted no part of a narcotics transaction and that when he finally did agree to meet Marshall, it was only "to string him along" as a favor to Kowel (R. 65, 87). Of course, the jury could disregard this testimony but if it is disregarded, we then have no proof whatsoever of the circumstances surrounding the Government's first approach to petitioner.

Kowel himself was not produced by the Government. We do not know, if petitioner's testimony is disregarded, what arts of persuasion were practiced on him, what resistance he made, what inducements were offered, or in fact anything at all about what transpired between petitioner and Kowel. It cannot possibly be said that there was any evidence that petitioner would, without Kowel's persuasion, have agreed even to meet Marshall.

The court below treated this argument lightly. The majority purported to accept petitioner's testimony that "he had consistently rebuffed Kowel's importunities" and noted his further testimony that at the time of the sale Kowel "was no longer in the picture" and "no longer concerned in the transaction" (R. 116). Ergo runs the implication, Kowel's persuasive efforts were of no significance and did not constitute any part of the Government's inducement. It is impossible, however, to believe that petitioner both (a) "consistently rebuffed" Kowel, and (b) simultaneously had a "predisposition and criminal design" to commit the crime suggested by him. Either he rebuffed Kowel (as he testified) and undertook initially to string Marshall along (as he testified), or he was in fact persuaded by Kowel and willingly took up Marshall's suggestion. Since, if we disregard petitioner's testimony the record is entirely silent as to his relationship with Kowel, there was no evidence of any kind from which the jury could have found that prior to his meeting with Kowel, petitioner had even a willingness to commit the offense in question, much less a "predisposition and criminal design."

Even if easy yielding to persuasion is alone sufficient to rebut the entrapment defense, it must be a yielding to the first persuader. A conviction cannot be permitted to stand solely on evidence of an easy yielding to the inducements of the *second* representative of the Government,

when the accused offers uncontradicted testimony that he yielded grudgingly and reluctantly to the inducements of the *first*.

Conclusion

The Judgment Below Should Be Reversed and the Case Remanded, With Instructions to Enter a Judgment of Acquittal.

Respectfully submitted,

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APPENDIX

Statutes

21 U.S.C. §174:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 U.S.C. §2553 (a):

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima

facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing narcotic drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

26 U.S.C. §2554 (a):

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

18 U.S.C. §2:

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.